

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

MANHATTAN COLLEGE,

Petitioner,

v.

NATIONAL LABOR RELATIONS  
BOARD,

Respondent.

Nos. 18-1113

**PETITIONER MANHATTAN COLLEGE’S SUBMISSION OF  
UNDERLYING DECISION FROM WHICH PETITION ARISES**

Pursuant to this Court’s May 2, 2018 Order, Petitioner Manhattan College (the “College”) submits the underlying decision from which this petition arises and a related decision. Manhattan College petitions for review of the final Decision and Order of the National Labor Relations Board (the “NLRB” or “Board”) in case No. 02-CA-201623 (April 27, 2018), attached as Exhibit A, which is a technical unfair labor practice case testing the Board’s certification of a union in an underlying representation case before the Board. The Board’s decision in the underlying representation case, No. 02-RC-023543 (April 20, 2017), is attached as Exhibit B; in that representation case, the Board granted in part and denied in part the University’s request for review.

Respectfully submitted,

/s/ Stanley J. Brown

Shelley Sanders Kehl  
E. Katherine Hajjar  
Bond, Schoeneck & King, PLLC  
600 Third Avenue, 22nd Floor  
New York, NY 10016  
(646) 253-2300  
skehl@bsk.com  
khajjar@bsk.com

*Of Counsel*

Stanley J. Brown  
HOGAN LOVELLS US LLP  
875 Third Avenue  
New York, NY 10022  
(212) 918-3000  
stanley.brown@hoganlovells.com

Joel D. Buckman  
HOGAN LOVELLS US LLP  
555 13th Street, NW  
Washington, DC 20004  
(202) 637-5600  
joel.buckman@hoganlovells.com

Dated: June 1, 2018

**CERTIFICATE OF SERVICE**

I hereby certify that on June 1, 2018, I filed the foregoing Petitioner Manhattan College's Submission of Underlying Decision from Which Petition Arises and exhibits through the Court's CM/ECF system, which will send a notice of filing to all registered users.

/s/ Stanley J. Brown

Stanley J. Brown

# EXHIBIT A

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

**Manhattan College and Manhattan College Adjunct Faculty Union, New York State United Teachers (NYSUT), AFT/NEA/AFL-CIO. Case 02-CA-201623**

April 27, 2018

**DECISION AND ORDER**

BY MEMBERS PEARCE, MCFERRAN, AND EMANUEL

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed on June 29, 2017, by Manhattan College Adjunct Faculty Union, New York State United Teachers (NYSUT), AFT/NEA/AFL-CIO (the Union), the General Counsel issued the complaint on September 19, 2017, alleging that Manhattan College (the Respondent) has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to recognize and bargain with it following the Union's certification in Case 02-RC-023543. (Official notice is taken of the record in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(d). *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint, and asserting affirmative defenses.

On October 4, 2017, the General Counsel filed a Motion for Summary Judgment. On October 17, 2017, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On November 14, 2017, the Respondent filed an Opposition to the Motion for Summary Judgment. On December 1, 2017, the General Counsel filed a Reply to the Opposition. On January 4, 2018, the Respondent filed a Sur-Reply to the General Counsel's Reply. On February 21, 2018, the General Counsel filed a limited response to the Respondent's Sur-Reply.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

**Ruling on Motion for Summary Judgment**

The Respondent admits its refusal to bargain, but contests the validity of the Union's certification of representative on the basis of its contentions, raised and rejected in the underlying representation proceeding, that the Board lacks jurisdiction over Manhattan College as a religiously-affiliated university and that the Board's test for asserting its jurisdiction, as set forth in *Pacific Lu-*

*theran University*, 361 NLRB 1404 (2014), constitutes an unconstitutional intrusion into the Respondent's religious liberty.<sup>1</sup>

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

**FINDINGS OF FACT**

**I. JURISDICTION**

At all material times, the Respondent has been a private nonprofit college, with a facility located at 413 Manhattan College Parkway, Bronx, New York, that has been engaged in the operation of a higher education institution.

Annually, the Respondent, in the course and conduct of its business operations has a gross annual operating revenue exceeding \$1 million. Annually, the Respondent, in the course and conduct of its business operation receives in excess of \$50,000 in income from the State of New York, an entity which is directly engaged in interstate commerce.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

**II. ALLEGED UNFAIR LABOR PRACTICES**

**A. The Certification**

Following the mail ballot representation election where ballots were mailed to eligible employees on February 16, 2011, the Union was certified on June 14, 2017,<sup>2</sup> as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

<sup>1</sup> Member Emanuel did not participate in the underlying representation proceeding. He expresses no opinion on the merits of the Board's decision in that proceeding or on whether *Pacific Lutheran University*, supra, was correctly decided. Nonetheless, he agrees with his colleagues that the Respondent has not raised any new matters that are properly litigable in this unfair labor practice proceeding and that summary judgment is appropriate, with the parties retaining their respective rights to litigate relevant issues on appeal.

<sup>2</sup> By an unpublished order dated April 20, 2017, the Board issued an Order excluding adjunct faculty working the Department of Religious

All individuals employed as part-time faculty with an adjunct academic rank who teach a minimum of a three (3) credit college degree level course for a full semester (or the equivalent hours of a semester length course), excluding adjunct faculty in the Department of Religious Studies, all other full and part-time employees, including visiting and full time faculty, regardless of teaching load, students who are employed by the College, and guards and supervisors as defined in the Act.

The Union continues to be the exclusive collective-bargaining representative of the unit employees under Section 9(a) of the Act.

#### *B. Refusal to Bargain*

By letter dated June 14, 2017, the Union requested that the Respondent recognize and bargain with it as the exclusive collective-bargaining representative of the unit employees. By letter dated July 12, 2017, the Respondent refused to recognize and bargain with the Union and indicated that it would challenge the certification of the Union.

We find that the Respondent's conduct constitutes an unlawful failure and refusal to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

#### CONCLUSION OF LAW

By failing and refusing since July 12, 2017, to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

#### REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); accord *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), *enfd.* 350 F.2d 57 (10th Cir. 1965); *Lamar Hotel*, 140 NLRB 226, 229

(1962), *enfd.* 328 F.2d 600 (5th Cir. 1964), *cert. denied* 379 U.S. 817 (1964).

#### ORDER

The National Labor Relations Board orders that the Respondent, Manhattan College, New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with Manhattan College Adjunct Faculty Union, New York State United Teachers (NYSUT), AFT/NEA/AFL-CIO (the Union) as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All individuals employed as part-time faculty with an adjunct academic rank who teach a minimum of a three (3) credit college degree level course for a full semester (or the equivalent hours of a semester length course), excluding adjunct faculty in the Department of Religious Studies, all other full and part-time employees, including visiting and full time faculty, regardless of teaching load, students who are employed by the College, and guards and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its New York, New York facility, copies of the attached notice marked "Appendix."<sup>3</sup> Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or cov-

Studies from the unit found appropriate and denied the Respondent's request for review in all other aspects. *Manhattan College*, Case 02-RC-023543, 2017 WL 1434209.

<sup>3</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

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ered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 12, 2017.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 2 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. April 27, 2018

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Mark Gaston Pearce, Member

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Lauren McFerran, Member

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William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

#### APPENDIX

##### NOTICE TO EMPLOYEES

##### POSTED BY ORDER OF THE

##### NATIONAL LABOR RELATIONS BOARD

##### An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with Manhattan College Adjunct Faculty Union, New York State United Teachers (NYSUT), AFT/NEA/AFL-CIO (the Union) as the exclusive collective-bargaining representative of our employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following appropriate bargaining unit:

All individuals employed as part-time faculty with an adjunct academic rank who teach a minimum of a three (3) credit college degree level course for a full semester (or the equivalent hours of a semester length course), excluding adjunct faculty in the Department of Religious Studies, all other full and part-time employees, including visiting and full time faculty, regardless of teaching load, students who are employed by us, and guards and supervisors as defined in the Act.

#### MANHATTAN COLLEGE

The Board's decision can be found at [www.nlr.gov/case/02-CA-201623](http://www.nlr.gov/case/02-CA-201623) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



# EXHIBIT B



UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

MANHATTAN COLLEGE  
Employer

and

Case 02-RC-023543

MANHATTAN COLLEGE ADJUNCT  
FACULTY UNION, NEW YORK STATE  
UNITED TEACHERS AFT/NEA/AFL-CIO  
Petitioner

DECISION ON REVIEW AND ORDER

The Employer's Request for Review of the Regional Director's Supplemental Decision and Order is granted solely with regard to Regional Director's inclusion of the Department of Religious Studies faculty within the unit of adjunct faculty found appropriate. Applying the Board's recent decisions in *Seattle University*, 364 NLRB No. 84 (2016) and *Saint Xavier University*, 364 NLRB No. 85 (2016), we find that the College holds out adjunct faculty in the Department of Religious Studies as performing a specific role in maintaining the University's religious educational environment.<sup>1</sup> As in those cases, a reasonable prospective applicant for an adjunct position in the College's Department of Religious Studies would expect that the performance of their responsibilities would require furtherance of the College's religious mission. The record shows that faculty in the College's Department of Religious Studies teach courses presented as having religious content; undergraduates may take those courses to fulfill core academic requirements; and faculty in the department have an expertise in Lasallian theology, other faith-based traditions, or other aspects of the religious experience. *Id.*, slip op. at in each decision. Accordingly, adjunct faculty in the Department of Religious Studies are excluded from the unit, and the College's Request for Review is denied in all other respects.<sup>2</sup>

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<sup>1</sup> Our colleague advances arguments similar to those he made in his dissents in *Seattle University* and *St. Xavier University*. For the reasons given in those decisions, we are not persuaded by those arguments. In particular, we disagree with his view that *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), forbids the Board from making a distinction between faculty who teach religious and secular courses because this type of inquiry alone raises First Amendment concerns. To the contrary, excluding adjunct faculty in the Department of Religious Studies does not mean that we have assessed the religious content of the courses they teach or otherwise compared the content of those courses to those taught by faculty in other departments. Rather, we have assessed only the College's presentation of those courses to the faculty, students, and public at large. *Seattle University*, 364 NLRB No. 84 (2016), slip op. at 2-3, n. 4-6; and *Saint Xavier University*, 364 NLRB No. 85 (2016), slip op. at 2-3, n. 3-5.

Although Member Pearce did not participate in *Seattle University* and *Saint Xavier University* and expresses no view as to whether they were correctly decided, he agrees to apply them as precedent in this case.

<sup>2</sup> The Regional Director correctly found that the ballots may be opened and counted, but, for the reasons stated here, the ballots of unit faculty in the Department of Religious Studies may not be counted. If those ballots have been commingled with other ballots, the Petitioner cannot be certified unless the Regional Director determines that it achieved a majority of countable ballots.

## ORDER

This case is remanded to the Regional Director for further appropriate action.

MARK GASTON PEARCE,

MEMBER

LAUREN McFERRAN,

MEMBER

Acting Chairman Miscimarra, dissenting.

Contrary to my colleagues, I would grant in its entirety Manhattan College's Request for Review of the Regional Director's Supplemental Decision and Order, in which the Regional Director asserted jurisdiction over the College and directed an election in a unit of "[a]ll individuals employed as part-time faculty with an adjunct academic rank who teach a minimum of a three (3) credit college degree level course for a full semester (or the equivalent hours of a semester length course)." My colleagues deny review of the Regional Director's finding that the Board should exercise jurisdiction over most of the petitioned-for unit faculty; however, they grant review in part and reverse the Regional Director's assertion of jurisdiction over faculty in the College's Department of Religious Studies. For three reasons, I believe there is a substantial issue regarding whether the Board lacks jurisdiction over the entire petitioned-for unit.

First, as I explained in my dissenting opinions in *Seattle University*, 364 NLRB No. 84, slip op. at 3–5 (2016) (Member Miscimarra, dissenting), and *Saint Xavier University*, 364 NLRB No. 85, slip op. at 3–5 (2016) (Member Miscimarra, dissenting), the distinction my colleagues draw between faculty who teach courses with "religious content" (who my colleagues find are exempt from the Board's jurisdiction) and the other petitioned-for unit faculty (who my colleagues find are subject to the Board's jurisdiction, presumably on the basis that those faculty teach courses with exclusively "secular" content) is forbidden by the main teaching of *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), where the Supreme Court emphasized that the "very process of inquiry" associated with this type of evaluation raises First Amendment concerns. *Id.* at 502.<sup>1</sup>

Second, as explained in my separate opinion in *Pacific Lutheran University*, 361 NLRB No. 157, slip op. at 26–27 (2014) (Member Miscimarra, concurring in part and dissenting in part), when determining whether a religious school or university is exempt from the Act's coverage based on First Amendment considerations, I believe the Board should apply the three-part test articulated by the Court of Appeals for the District of Columbia Circuit in *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002). Under that test, the Board has no jurisdiction over faculty members at a school that (1) holds itself out to students, faculty and

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<sup>1</sup> My colleagues say that they have not assessed the religious content of the courses taught by faculty in the College's Department of Religious Studies, but "only the College's presentation of those courses to the faculty, students, and public at large." However, whether the content of a course is examined by looking at a syllabus distributed only to students taking the course or at publicly available documents is beside the point. Either way, it is the content of the course that is being evaluated. Assessing the College's "presentation" of a course means assessing the course's content as set forth in that presentation. See *Seattle University*, above, at 5 fns. 16-17 (Member Miscimarra, dissenting); *Saint Xavier University*, above, at 5 fns. 17-18 (Member Miscimarra, dissenting).

community as providing a religious educational environment; (2) is organized as a nonprofit; and (3) is affiliated with or owned, operated, or controlled, directly or indirectly, by a recognized religious organization, or with an entity, membership of which is determined, at least in part, with reference to religion. *Id.* at 1343. In my view, Manhattan College has clearly raised a substantial issue regarding whether it is exempt from the Act's coverage under that three-part test. It is undisputed that the College holds itself out to the public as providing a religious educational environment. Additionally, the College is organized as a nonprofit. Further, the College, which was founded by the De La Salle Christian Brothers, is affiliated with the Catholic Church, is a member of the Lasallian Association of Colleges and Universities, and is subject to guidelines that the Catholic Church has issued for universities. Accordingly, I would grant the College's request for review because substantial questions exist regarding (i) whether the Board lacks jurisdiction over the College as a religiously affiliated educational institution, and (ii) whether the *Pacific Lutheran* standard is unconstitutional under the First Amendment. I would consider these jurisdictional and constitutional issues on the merits.

Third, even if one applies *Pacific Lutheran*'s two-pronged test, I would grant review. As stated above, it is undisputed that Manhattan College holds itself out as providing a religious educational environment. Further, I believe that the College has raised a substantial issue regarding whether individuals in the petitioned-for unit play a specific role in creating or maintaining the College's religious educational environment. Specifically, I believe substantial questions exist with respect to the specific role played by part-time faculty, regardless of department, in furthering the College's religious mission, including by systematically promoting the emphasis on the interplay of faith and reason and by encouraging dialogue with other traditions to help accomplish the Catholic Church's intellectual work, which the College asserts is an important aspect of a Lasallian Catholic education. See *Great Falls*, *supra*, 278 F.3d at 1346 ("That a secular university might share some goals and practices with a Catholic or other religious institution cannot render the actions of the latter any less religious."); *Pacific Lutheran University*, *supra*, slip op. at 31 (Member Johnson, dissenting) ("The majority also errs fundamentally here by assuming a false dichotomy between 'religious' and 'secular' instruction.").

For these reasons, I believe the Board should grant review of the Regional Director's decision that the Board has jurisdiction over the petitioned-for part-time faculty members. Accordingly, I respectfully dissent.

Dated, Washington, D.C., April 20, 2017.

PHILIP A. MISCIMARRA,    ACTING CHAIRMAN